Filed 3/2/12 P. v. Malanche CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE CASILLAS MALANCHE,

Defendant and Appellant.

F060845

(Super. Ct. No. F09900010)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, LeAnne Le Mon and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Jose Casillas Malanche of rape (Pen. Code,[1] § 261, subd. (a)(2); count 1), sodomy (§ 286, subd. (c)(2); count 2), and sexual penetration (§ 289, subd. (a)(1); count 3). The jury also found that appellant personally inflicted great bodily injury on the victim in the commission of each offense. (§ 12022.8, former § 667.61,[2] subd. (b).)

Appellant contends that the trial court erred when it allowed a nurse to testify as to what the victim told her during an examination, because the victim's statements were translated from Hmong by an unidentified interpreter. Appellant also contends that the trial court failed to instruct the jury on battery as a lesser included offense of sexual penetration and gave the jury a one-sided instruction regarding the use of appellant's out-of-court statements. Finally, appellant claims that the trial court imposed an unauthorized sentence. Respondent also finds fault with the sentence, but for a different reason.

We agree with respondent that the sentence was unauthorized and remand for resentencing. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

Early in the morning of May 4, 2008, J.Y. went out to collect cans, collecting them in a cart or stroller. As she approached a dumpster in an alley, she looked back and saw a man across the street, and she let him pass. The man appeared to be Hispanic. J.Y. walked a couple steps, and then felt a hand cover her mouth and another hand choke her neck. The man choked her and hit her on the head. He took off her shirt and grabbed her hair, continuing to hit her. He took off her shoe, her pants, and her underwear and hit her head to the cement.

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1 Subsequent statutory references are to the Penal Code unless otherwise noted.

2 A former version of section 667.61 was in effect at the time of the commission of the crimes. (Stats. 2006, ch. 337, § 33, eff. Sept. 20, 2006, amended by Initiative Measure (Prop. 83, § 12, approved Nov. 7, 2006, eff. Nov. 8, 2006).)

At trial more than two years after the attack, J.Y. testified that her attacker hit her head until she was unconscious and "then he did bad thing to [her]." She testified that he raped and sodomized her. The prosecutor asked if the man put anything else inside her vagina, and she responded, "Maybe he didn't." On the day of the attack, however, J.Y. told a nurse that he put his finger in her vagina before penetrating her with his penis. Similarly, when a detective met with J.Y. a few days after the attack, she told him that the man forced her to the ground and inserted his finger inside her vagina and then raped and sodomized her.

After the attack, the man ran away. The Fresno Police Department received 911 calls around 6:15 a.m. from two callers who reported seeing an older woman on the street who appeared to have been beaten up. Responding police officers saw J.Y. on street, trying to get around "like a blind person." Her eyes were swollen shut and her underwear was wrapped around her ankle. The officers called for an ambulance.

J.Y. was 62 years old. She was not more than five feet tall and weighed about 120 pounds. She did not speak English. Determining that J.Y. possibly spoke Hmong, the police officers requested a Hmong-speaking officer. Officer Lance Yang, who grew up speaking Hmong, responded to the call and went to the scene of the attack. He spoke to J.Y. about what happened and also assisted emergency medical personnel. Officer Yang testified that J.Y.'s face was covered in bruises and she was bleeding from her eyes, mouth, and nose.

J.Y. was treated in the emergency department of Fresno Community Medical Center. She suffered a fracture to her cheekbone and extensive soft tissue swelling of the face. In addition, bruises, abrasions, and redness covered her body.

After J.Y. received medical attention, registered nurse Laura Woods conducted a sexual assault forensic examination (SAFE) for the purpose of collecting evidence. Woods documented J.Y.'s injuries and collected vaginal swabs, rectal swabs, and other evidence such as hair samples and fingernail scrapings. A criminalist at the California

Department of Justice Regional Laboratory isolated sperm cells from one of the rectal swabs and extracted DNA. A DNA swab was taken from appellant, and appellant could not be eliminated as a source of the sperm cells from the rectal swab.[3] The criminalist testified that the DNA profile from the rectal swab would be expected to occur in a randomly selected individual in approximately one in 890 quadrillion Hispanics.

On December 30, 2008, Fresno police detectives conducted a videotaped interview with appellant. He admitted that he beat up and raped a woman in an alley on May 4, 2008. Appellant said he was drunk and drugged and he did not know what he was doing.

A jury trial began on July 14, 2010. Appellant did not testify, but the jury was shown his videotaped interview. The jury found appellant guilty of all charges and found all the enhancements to be true. The trial court sentenced appellant to a determinate term of 24 years, followed by an indeterminate term of 15 years to life in state prison.

DISCUSSION

I. Admission of J.Y.'s Statements to the nurse, Woods.

A. Background.

Woods testified that it is her practice to interview a patient before beginning a SAFE exam. She explained that she would focus on particular areas based on the information provided by the patient. Because Woods did not speak Hmong and J.Y. did not speak English, Woods interviewed J.Y. using an interpreter. When Woods testified that J.Y. mentioned she had been licked or bitten on her face, defense counsel objected based on lack of foundation and hearsay.

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3 According to a probation report, after appellant was convicted of an unrelated drug charge in October 2008, he provided a DNA sample pursuant to section 296. Appellant became a suspect in this case after his DNA sample "hit," i.e., matched, the DNA collected in J.Y.'s SAFE exam. (See *People v. Buza* (2011) 197 Cal.App.4th 1424, review granted Oct. 19, 2011, S196200 [describing California's DNA database and the national Combined DNA Index System, which checks DNA profiles against crime scene samples].)

The objection was discussed outside the presence of the jury. Defense counsel stated, "I don't think that this witness could lay even a foundation regarding the interpreter, regarding the accuracy the interpreter's ability to speak Hmong, so I would be objecting on a foundational basis." The trial court cited *Correa v. Superior Court* (2002) 27 Cal.4th 444 (*Correa*), for the proposition that an interpreter may be considered a "conduit" between speakers of different languages. The court noted that there needed to be some indication of the competency of the interpreter.

After the discussion, the prosecutor continued his direct examination. Woods testified that she communicated with J.Y. through a paid Hmong interpreter from Pan National, a company contracted through the hospital. She testified that the interpreter translated her questions from English to Hmong and translated J.Y.'s responses from Hmong to English. When Woods was asked about what J.Y. said, defense counsel again objected on the ground of lack of foundation, and the trial court overruled the objection.

B. The "language-conduit" theory.

On appeal, appellant again raises the argument that J.Y.'s statements made during the SAFE exam should not have been admitted because there was no evidence of the interpreter's qualifications or skill. We are not persuaded.

In *Correa, supra*, 27 Cal.4th 444, 457, our Supreme Court adopted the "language-conduit" theory for deciding whether to admit out-of-court statements that were communicated to the listener through an interpreter. "The language-conduit theory calls for a case-by-case determination whether, under the particular circumstances of the case, the translated statement fairly may be considered to be that of the original speaker." (*Ibid.*) In such cases, "the statement simply is considered to be the statement of the original declarant, and not of the translator, so that no additional level of hearsay is added by the translation." (*Id.* at p. 455.) The *Correa* court adopted the approach taken by the Ninth Circuit Court of Appeals in *U.S. v. Nazemian* (9th Cir. 1991) 948 F.2d 522 (*Nazemian*). (*Correa, supra*, 27 Cal.4th at p. 457.)

The *Nazemian* court recognized "a number of factors which may be relevant in determining whether the interpreter's statements should be attributed to the defendant under either the agency or conduit theory, such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." (*Nazemian, supra*, 948 F.2d at p. 527.) No one factor is dispositive. In *Nazemian*, the defendant challenging the admission of translated statements argued that there was no formal evidence of the interpreter's competence. The court held that such evidence was not necessary because "the fact that the interpreter continued in that role over a prolonged period and multiple meetings suggests that the translation must have been competent enough to allow communication between the parties." (*Id.* at p. 528.)

In *Correa*, the court allowed police officers to testify as to statements made by an alleged victim and a witness, where the statements had been translated by "unbiased bystanders." (*Correa, supra*, 27 Cal.4th at p. 448.) The court noted that the officers were able to describe the circumstances under which the translations were made and also pointed to evidence that corroborated the translated statements. (*Id.* at p. 466.)

We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) In reviewing a determination that the language-conduit theory applies, "we must draw all legitimate inferences in favor of the implicit determination" of the trial court that the interpreter was "sufficiently skilled and unbiased so that the translated statements fairly could be attributed to the declarant[]." (*Correa, supra*, 27 Cal.4th at p. 467.)

Here, the trial court expressly acknowledged the language-conduit theory of *Correa*. The evidence showed that the interpreter was a professional hired through a

company used by the hospital. No evidence was offered to show bias or motive to mislead. The fact that J.Y. gave responsive answers to Woods's questions[4] tends to show "the translation must have been competent enough to allow communication between the parties." (*Nazemian*, *supra*, 948 F.2d at p. 528.) In addition, as in *Correa*, "evidence produced during the investigation tended to corroborate the substance of the translated statements." (*Correa*, *supra*, 27 Cal.4th at p. 467.) The physical evidence was consistent with the translated statements. Sperm cells were isolated from a rectal swab, consistent with J.Y.'s statement to Woods that she had been sodomized. During her examination of J.Y's genitalia, Woods observed redness and a vertical tear in the inner labia minor and another tear in the posterior fourchette and redness in the vaginal walls, consistent with J.Y.'s statements that she had been digitally penetrated and raped. Moreover, the translated statements were largely corroborated by J.Y. herself at trial.[5]

Further, appellant offered no "'particular facts'" that would "'cast significant doubt upon the accuracy of a translated [statement].'" (*Correa*, *supra*, 27 Cal.4th at p. 459, quoting *United States v. Martinez-Gaytan* (5th Cir. 2000) 213 F.3d 890, 891.) Woods did not testify that the interpreter hesitated or had any difficulty communicating. (*Correa*, *supra*, 27 Cal.4th at pp. 466-467 ["The investigating officers observed the

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4 For example, Woods asked if there was penetration of her vagina by a penis, and J.Y. responded, "He put his finger in first and then his penis, then he turned me over and pushed my face on the ground and do it from behind me. He pushed his penis in my bottom, only he put his penis inside me." Woods asked many specific questions. Asked if there was oral copulation, J.Y. said no. J.Y. said that the man did not use contraceptive jelly or foam. Asked if he used a condom, J.Y. said she was unsure because she could not see and could not feel whether he used a condom. Asked if the man ejaculated, she said she could not tell. It is unlikely Woods would have received such appropriate and consistent responses if the interpreter were not competent in Hmong.

5 Appellant focuses on the fact that, at trial, J.Y. did not testify that she was digitally penetrated. In other respects, however, her testimony about the attack was consistent with the statements she made to Woods.

process of translation and did not report any apparent hesitation or difficulty in communicating . . ."].)

These circumstances were sufficient for the trial court to determine that the translated statements could be considered the statements of the original speaker under the language-conduit theory. The present case is readily distinguishable from *People v. Pantoja* (2004) 122 Cal.App.4th 1, contrary to appellant's claim that the cases are "identical." In *Pantoja*, the issue was the reliability of an application for a restraining order filed by the victim. (*Id.* at p. 9.) There was no evidence about the circumstances under which the declaration had been prepared, and the court noted that it was unlikely the victim even wrote the application, which was in English, because she spoke almost no English. If her statements had been translated, which was unknown, there was no evidence about who the translator was. (*Id.* at p. 12.) Here, there is no similar unknown; Woods was present at the translation and testified about the circumstances under which J.Y.'s statements were made. *United States v. Martinez-Gaytan*, *supra*, 213 F.3d 890, another case cited by appellant, is also distinguishable. In that case, after speaking with a translator in Spanish, the declarant refused to sign a purported written synopsis in English of his alleged confession. (*Id.* at p. 891.) In this case, there was no similar contemporaneous rejection by J.Y. of the translated statements.

In sum, there was sufficient evidence for the trial court to determine that the translated statements fairly could be attributed to J.Y., and there was no abuse of discretion in allowing Woods to testify about what J.Y. said during the SAFE exam.

C. Sixth Amendment.

Appellant also contends that he had no opportunity to cross-examine the hospital interpreter, and the admission of J.Y.'s statements to Woods violated his Sixth Amendment rights as described in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). However, "[a] defendant may not argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial." (*People v. Partida* (2005) 37

Cal.4th 428, 431.) Appellant did not raise the Sixth Amendment issue in the trial court and thus has not preserved the issue for appeal. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn.14 [hearsay objection at trial did not preserve Sixth Amendment violation claim on appeal].)

Appellant asserts that his counsel's objection was sufficient to preserve the Sixth Amendment issue, citing *People v. Yeoman* (2003) 31 Cal.4th 93. We disagree. The *Yeoman* court recognized, "no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*Id.* at p. 117.)

A Sixth Amendment claim, however, is not a mere restatement of the objection raised at trial. The Sixth Amendment prohibits "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination." (*Crawford, supra,* 541 U.S. at pp. 53-54.) Generally, the focus of a Sixth Amendment claim is whether a statement is "testimonial" for purposes of the confrontation clause. (See *People v. Cage* (2007) 40 Cal.4th 965, 977-979.)

At trial, defense counsel objected to Woods's testimony based on lack of foundation, arguing that there was no evidence regarding the "interpreter's ability to speak Hmong." Defense counsel made no argument regarding whether the statements were "testimonial" for Sixth Amendment purposes. Further, as we have discussed above, the issue raised—the competence of an interpreter—may be established by the surrounding circumstances and corroborating evidence. There is no requirement that an interpreter testify in order to satisfy the language-conduit theory. (See, e.g., *Nazemian, supra,* 948 F.2d at pp. 525-528 [where interpreter did not testify at trial, no error in determining the interpreter was "a mere language conduit" and admitting translated

statements into evidence].) Thus, it cannot be argued that defense counsel's objection raised a Sixth Amendment issue.

In any case, appellant's argument fails on the merits.[6] Under the language-conduit theory, a translated statement "is considered to be the statement of the original declarant, and not of the translator, so that no additional level of hearsay is added by the translation." (*Correa, supra*, 27 Cal.4th at p. 455.) Accordingly, the statements that appellant now objects to on Sixth Amendment grounds are considered to be the statements of the original declarant, J.Y. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Crawford, supra*, 541 U.S. at p. 59, fn.9.) Because J.Y. testified at trial, the Sixth Amendment placed no constraints on the admission of her statements to Woods during the SAFE exam. (See also *Nazemian, supra*, 948 F.2d at p. 528 ["Because [the defendant] and the translator are . . . treated as identical for testimonial purposes, the admission of [a DEA agent's] testimony as to [the defendant's] translated statements created neither confrontation clause nor hearsay problems"].) If appellant's counsel had objected to Woods's testimony based on the Sixth Amendment, the objection properly would have been overruled.

II. Jury Instructions.

Appellant claims the trial court erred in instructing the jury in two respects. First, he contends the trial court should have instructed the jury on battery as a lesser included offense of sexual penetration. Second, he argues that CALCRIM No. 359, an instruction on a defendant's out-of-court statements and corpus delicti, was unfairly one-sided.

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6 Appellant argues that if his counsel failed to preserve the issue, he received ineffective assistance of counsel and implicitly asks the court to address the issue for the sake of judicial efficiency.

A. Battery as a lesser included offense.

A trial court has a sua sponte duty to "instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118.)

In count 3, appellant was charged with sexual penetration in violation of section 289, subdivision (a)(1). "Sexual penetration" is "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1).) The charged offense requires the commission of an act of sexual penetration "accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person …." (*Id.*, subd. (a)(1)(A).)

Appellant contends the trial court had a sua sponte duty to instruct the jury on battery[7] as a lesser included offense of sexual penetration. Respondent concedes that battery is a necessarily included offense of sexual penetration. (Cf. *People v. Hughes* (2002) 27 Cal.4th 287, 366 [battery is a necessarily included offense of sodomy because "one cannot commit forcible sodomy without also committing battery"].) Nonetheless, respondent argues that the trial court was not required to instruct on battery, and we agree.

"Instruction on a lesser included offense is required only when the record contains substantial evidence of the lesser offense, that is, evidence from which the jury could reasonably doubt whether one or more of the charged offense's elements was proven, but

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[7] "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.)

find all the elements of the included offense proven beyond a reasonable doubt." (*People v. Moore* (2011) 51 Cal.4th 386, 408-409.)

In this case, as appellant notes, there was conflicting evidence regarding whether sexual penetration occurred at all. At trial, J.Y. indicated that her attacker did not put his finger in her vagina. Woods and a detective, on the other hand, testified that J.Y. reported that the attacker put his finger in her vagina before raping and sodomizing her. There was no evidence, however, suggesting that one or more elements of sexual penetration were missing but the elements that were proven amounted to battery. The trial court and defense counsel were in accord. Discussing the jury instructions, defense counsel stated, "I don't really think the evidence supports lessers." The court agreed, stating, "there is . . . an issue in this case about whether or not there was a digital penetration, but there either was or wasn't, but there wasn't really evidence for an attempt . . .." Under these circumstances, an instruction on battery was not warranted. (See *Moore, supra,* 51 Cal.4th at p. 409.)

Appellant also argues an instruction on battery should have been given as there was evidence that appellant was intoxicated at the time of the crime and his intoxication could negate the intent necessary for the commission of sexual penetration.[8] Specifically, he argues that the jury could have found that appellant was too intoxicated to harbor the specific intent to act "for the purpose of sexual arousal, gratification, or abuse." (§ 289, subd. (k)(1).) Assuming for the sake of argument that evidence of intoxication was sufficient to require an instruction on battery, any error in omitting the instruction was harmless.

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[8] The evidence of intoxication was appellant's statements during his videotaped interview with police detectives. During the interview, he said many times that he was drunk and drugged. At the beginning of the interview, appellant stated that he was celebrating a birthday the night before the attack and he was addicted to alcohol.

"[T]he failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility . . . such misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome." (*People v. Breverman* (1998) 19 Cal.4th 142, 165.)

In this case, there was conflicting testimony on whether sexual penetration occurred. In her closing argument, defense counsel argued there was insufficient evidence of sexual penetration because J.Y. did not testify that it occurred and appellant never admitted to sexual penetration in his videotaped interview. She did not argue that appellant was too drunk to have acted for the purpose of sexual arousal, gratification, or abuse. Nor did defense counsel request an instruction on voluntary intoxication. Certainly, the trial court had no sua sponte duty to instruct on voluntary intoxication, and appellant does not argue otherwise. (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.) The jury found that appellant raped and sodomized J.Y. It is not reasonably probable that if the jury had received instructions on battery, it would have concluded that appellant committed an act of genital penetration but he did so without the requisite intent. Accordingly, we conclude that the alleged instructional omission was harmless.

B. CALCRIM No. 359.

The jury was given the following instruction (CALCRIM No. 359):

> "The defendant may not be convicted of any crime based on his out-of-court statement alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed.
>
> "That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime may be proved by the defendant's statement alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

Appellant argues that the instruction was given in error because it told the jury it could rely on appellant's out-of-court statements to convict him, but it did not instruct the jury that—with respect to count 3—it could also acquit based on his out-of-court statements. This argument is without merit.

The record shows that defense counsel requested CALCRIM No. 359. When defense counsel requests a particular instruction, the invited error doctrine bars argument on appeal that the instruction was given in error. (*People v. Wader* (1993) 5 Cal.4th 610, 658.)

Even if the argument were not barred, we would find no error. When a defendant's out-of-court statements form part of the prosecution's evidence, the trial court has a sua sponte duty to instruct the jury that a finding of guilt cannot be predicated on the statements alone. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1170.) Consequently, the trial court was required to instruct the jury that it could only rely on appellant's out-of-court statements to convict him if it concluded that other evidence showed that the charged crime was committed.

Appellant asserts "[t]his case is just like" *Cool v. United States* (1972) 409 U.S. 100 (*Cool*). In *Cool*, an accomplice gave testimony that was "completely exculpatory" of the defendant. (*Id.* at p. 101.) The jury was instructed, "'[T]estimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond a reasonable doubt the essential elements of the charges in the Indictment against the defendants.'" (*Id*. at p. 103, fn.4.) The Supreme Court observed that the instructions were confusing because the accomplice testimony was exculpatory. The court continued, "[E]ven if it is assumed that [the accomplice's] testimony was to some extent inculpatory, the instruction was still fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis." (*Ibid.*)

The present case is nothing like *Cool*. The jury was not told that it could convict solely on the basis of appellant's statements. It was told it could *not* convict based on his statements alone. Further, the accomplice's testimony in *Cool* was exculpatory; the accomplice denied that the defendant had anything to do with the crime. (*Cool*, *supra*, 409 U.S. at p. 101.) Under those circumstances, it was unfair to tell the jury it could use the accomplice's testimony to convict without telling the jury that the testimony could be used to acquit. Here, appellant did not make any comparably exculpatory statements. With respect to count 3, he did not make any out-of-court statements at all. The detectives did not ask him about digital penetration, and he did not voluntarily admit or deny it. Under these circumstances, it cannot be said that the jury instruction given was unfair or unbalanced.

III. The Sentence.

Both parties claim error in the sentence, although they offer different reasons. We reject appellant's argument and find merit to respondent's argument.

A. Background.

Appellant was found guilty of three offenses. With respect to each offense, the jury additionally found that appellant personally inflicted great bodily injury on the victim in the commission of the offense. For count 1 (rape), the trial court sentenced appellant to an indeterminate term of 15 years to life pursuant to former section 667.61, subdivision (b), the "one strike" law. The court then determined that full and consecutive terms were appropriate based on the "degree of brutality" utilized by appellant in committing the "incredibly violent" crimes. For count 2 (sodomy), the court imposed an aggravated term of eight years, plus five years pursuant to section 12022.8 (infliction of great bodily injury) for a full and consecutive term of 13 years. For count 3 (sexual penetration), it imposed a middle term of six years, plus five years pursuant to section 12022.8 for a full and consecutive term of 11 years.

Former section 667.61, subdivision (b) provided that "any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life." Each of the three offenses appellant was convicted of is listed in former subdivision (c). (Former § 667.61, subd. (c)(1), (5), (6).) One of the circumstances specified in former subdivision (e) is that the defendant personally inflicted great bodily injury on the victim in the commission of the offense in violation of section 12022.8. (Former § 667.61, subd. (e)(3).) On its face, therefore, former section 667.61 applied to each of the three offenses.

B. Appellant's argument.

Appellant argues that his sentence violates former section 667.61, subdivision (f) because the court used the great bodily injury enhancements to impose both a 15-year-to-life sentence and two additional five-year enhancements. Appellant cites former section 667.61, subdivision (f) as support for his argument. This subdivision provided in part:

> "If only the minimum number of circumstances specified in subdivision . . . (e) that are required for the punishment provided in subdivision . . . (b) to apply have been pled and proved, that circumstance . . . shall be used as the basis for imposing the term provided in subdivision . . . (b) . . ., rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section."

Appellant's position essentially is that former section 667.61, subdivision (b) should apply only once for each occasion of criminal activity, even if it results in convictions for multiple covered offenses. The language of the statute does not support appellant's position. Former section 667.61, subdivision (b) applied to "an offense," not an "occasion." It follows that former section 667.61, subdivision (f), which referred to punishment under subdivision (b), also applied to each offense, not each occasion.

Moreover, respondent points out that a previous version of section 667.61 did apply enhanced punishment on a "per occasion" and "per victim" basis; the previous statute included a provision that the enhanced punishment should be imposed "once for any . . . offenses committed against a single victim during a single occasion." (Former § 667.61, subd. (g), added by Stats. 1993-1994, 1st Ex.Sess., ch 14, § 1.) That provision was deleted in 2006 and does not exist in the version of section 667.61 applicable to appellant. (Former § 667.61, amended by Stats. 2006, ch. 337, § 33, eff. Sept. 20, 2006, amended by Initiative Measure (Prop. 83, § 12, approved Nov. 7, 2006, eff. Nov. 8, 2006).) The plain language in the applicable statute is clear, but the *deletion* of the "single occasion" language is even further indication that appellant's proposed interpretation of the statute is incorrect. For these reasons, we reject appellant's argument that the great bodily injury enhancements may only be considered once for sentencing purposes.

C. Respondent's argument.

Respondent, on the other hand, argues that appellant's sentence was unauthorized because the trial court was required to apply former section 667.61 to each of the three counts. (See *People v. Delgado* (2010) 181 Cal.App.4th 839, 854 [Attorney General may raise a sentencing error in connection with a defendant's appeal].) We agree. Former section 667.61, subdivision (f) *required* the trial court to impose punishment under its sentencing scheme, unless another provision of law provides for a greater penalty. Since former section 667.61 applied to each of the three counts appellant was convicted of, the trial court was required to use its sentencing scheme for all of them, not only count 1.

The trial court appears to have relied on *People v. Jones* (2001) 25 Cal.4th 98 to determine that appellant was subject to only a single sentence of 15 years to life. We agree with respondent that *Jones* does not apply to this case. *Jones* addressed the meaning of a "single occasion" under the previous version of the statute. (*Id.* at p. 103.) As discussed above, the "single occasion" language no longer exists in the applicable

version of the statute. Just as the previous version of section 667.61 does not apply to appellant, a case interpreting that statute does not apply to appellant either.

In conclusion, under former section 667.61, subdivision (b), the sentence for each of the three counts is 15 years to life. As the trial court was aware, a full and consecutive term may be imposed for each count but is not required. (§ 667.6, subds. (c), (e)(1), (4), (8).) On remand, the trial court is required to apply the sentencing scheme of former section 667.61 for counts 2 and 3, but it may impose consecutive or concurrent terms at its discretion. (E.g., *People v. Byrd* (2011) 194 Cal.App.4th 88, 106 [remanding to the trial court to exercise discretion whether to impose consecutive or concurrent term]; *People v. Delgado, supra*, 181 Cal.App.4th at p. 854 ["We may set aside an unauthorized sentence so a proper sentence may be imposed, even if the new sentence is harsher"].)

DISPOSITION

The sentence imposed on counts 2 and 3 is vacated and remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

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LEVY, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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CORNELL, J.